Table of Contents

CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

1. U.S.-Chile Extradition Treaty

See Chapter 3.A.1. for discussion of the U.S.-Chile Extradition Treaty signed in 2013.

2. Objection to Reservation by Namibia

On October 17, 2013, the U.S. Mission to the UN sent a diplomatic note to the United Nations, in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, conveying its objection to a reservation made by the Government of Namibia to the Convention. The body of the diplomatic note is set forth below.

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The United States Mission to the United Nations presents its compliments to the United Nations, in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, and refers to the reservation made by the Government of Namibia upon ratification of the International Convention for the Suppression of the Financing of Terrorism, with Annex (1999) (the Convention), October 18, 2012.

The Government of the United States of America, after careful review, considers the reservation to be contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The Government of the United States also considers the reservation to be contrary to the terms of Article 6 of the Convention, which provides: "Each State Party shall

adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the reservation made by the Government of Namibia upon ratification of the Convention. This objection does not, however, preclude the entry into force of the Convention between the United States and Namibia.

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3. Multilateral Nuclear Environment Programme in the Russian Federation ("MNEPR")

On May 14, 2013, the U.S. deposited its instrument of acceptance to the MNEPR. The MNEPR creates an international programme which aims to foster cooperation and assistance to the Russian Federation in regards to the safety of spent nuclear fuel and radioactive waste management. The United States joined the MNEPR prior to signing a bilateral Protocol to the MNEPR in June, providing for ongoing cooperative threat reduction activities by the United States and Russia. See Chapter 19.B.6.c.

4. Arms Trade Treaty

On September 25, 2013, the United States signed the Arms Trade Treaty ("ATT"), joining 114 other States that had signed by that date. The ATT requires States Parties to regulate international transfers of conventional arms, with the ultimate goal of preventing illicit trade and fostering international peace and security. See Chapter 19.J. for further discussion of the negotiation and conclusion of the Arms Trade Treaty.

B. LITIGATION INVOLVING TREATY LAW ISSUES

1. Constitutionality of U.S. Statute Implementing the Chemical Weapons Convention

As discussed in *Digest 2012* at 97-100, the United States filed a brief in the U.S. Supreme Court in opposition to the petition for certiorari in *Bond v. United States*, No. 12-158. The petitioner, Carol Anne Bond, was convicted of using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1). Closely tracking the language of the Chemical Weapons Convention, Section 229 criminalizes "knowingly" "possess[ing]" or "us[ing]" a "chemical weapon." Petitioner had used two toxic chemicals to attempt to poison another woman who had become pregnant as a result of an affair with petitioner's husband. Among the

issues raised on appeal was whether "local" conduct such as petitioner's is the proper subject of the Treaty Power.

The U.S. Court of Appeals for the Third Circuit held, on appeal of the case in 2012, that the U.S. statute implementing the Chemical Weapons Convention is a valid exercise of Congress's Treaty Power under the Constitution. See *Digest 2011* at 111-17 for excerpts from U.S. briefs submitted in the court of appeals. The U.S. Supreme Court granted the petition for certiorari. The United States filed its brief in the Supreme Court on August 9, 2013. Excerpts below (with footnotes and citations to the record omitted) include the argument that the application of the statute to Ms. Bond was authorized by Congress's power to enact laws necessary and proper to execute the Treaty Power. The brief is available at

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As the court of appeals held, Congress had the authority to prohibit petitioner's conduct under its power under the Necessary and Proper Clause to implement a treaty. That authority is broad in order to achieve its purpose: empowering the Nation to carry out its international legal commitments in furtherance of U.S. foreign policy and national security goals.

Petitioner concedes that the Convention itself is "valid," …

"Instead, [petitioner] is raising a much more limited and narrowly focused as-applied challenge," contending that the facially valid Act, implementing a valid treaty, "cannot be constitutionally applied to her in the circumstances of this case." According to this argument, any particular application of treaty-implementing legislation can be successfully challenged as unconstitutional if the particular judge concludes that the application involves "local" activities. Moreover, petitioner contends that this is such a case, and that her conviction should therefore be set aside. Petitioner is mistaken. There is simply no basis in the Constitution, history, or this Court's precedents for carving out particular applications of a facially valid statute that implements a valid treaty on the ground that the conduct at issue is too local.

1. The Treaty Power is exclusively federal

The Treaty Clause grants the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. Art. II, § 2, Cl. 2. Unlike the various "legislative Powers" specifically enumerated in Article I, Section 8, the Constitution assigns the Treaty Power to the President and Senate as a separate "Article II power." *United States v. Lara*, 541 U.S. 193, 201 (2004).

The Supremacy Clause, in turn, provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Thus, it is well-established that the Treaty Clause allows the federal government "to enter into and enforce a treaty *** despite state objections" and that a valid treaty preempts inconsistent state law. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).

The Constitution expressly makes the federal grant of treaty-making authority exclusive by prohibiting States from "enter[ing] into any Treaty, Alliance, or Confederation." Art. I, § 10, Cl. 1; see *id*. Cl. 3 (prohibition on States' entering into "any Agreement or Compact" with a foreign power without first obtaining the consent of Congress). Moreover, "the treaty-making

power was never possessed or exercised by the states separately; but was originally acquired and always exclusively held by the Nation, and, therefore, could not have been among those carved from the mass of state powers, and handed over to the Nation." George Sutherland, *Constitutional Power and World Affairs* 156 (1919) (Sutherland); see generally *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-318 (1936) (*Curtiss-Wright*). Thus, the Tenth Amendment's reservation of rights to the States is "no barrier" to the adoption of treaties and to the enactment of treaty-implementing legislation. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

Although the Treaty Clause "does not literally authorize Congress to act legislatively," *Lara*, 541 U.S. at 201, the Necessary and Proper Clause empowers Congress to enact "Laws" that are "necessary and proper for carrying into Execution" all powers conferred in the Constitution, including the Treaty Power, Art. I, § 8, Cl. 18. Accordingly, while treaties are the supreme law of the land under the Supremacy Clause, when "treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (brackets and citation omitted); see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

2. It has long been settled that the Treaty Power extends to matters ordinarily within the jurisdiction of the States

The court of appeals correctly held that Congress's prohibition of petitioner's conduct was an appropriate exercise of its Necessary and Proper authority to implement a treaty and did not implicate any other constitutional constraints. The Constitution's text, structure, and history, as well as longstanding treaty practice and an unbroken line of precedents, both before and after *Missouri v. Holland*, 252 U.S. 416 (1920), all support that conclusion.

a. Petitioner's argument that the federal government cannot effectuate its treaty obligations if doing so would result in regulation in areas of traditional state authority has been advanced—and rejected—numerous times since the Founding.

i. *Framing of the Constitution*. The national government's inability to ensure treaty compliance—and need to rely on the States when attempting to do so—were among the principal defects in the Articles of Confederation that led to adoption of the Constitution.

Under the Articles of Confederation, Congress concluded numerous treaties, but because it lacked the necessary authority to enact laws to implement them, it typically passed resolutions urging the state legislatures to do so. Samuel B. Crandall, *Treaties: Their Making and Enforcement* 37-38 (2d ed. 1916) (Crandall). The States routinely ignored these resolutions. *Id.* at 39-42. …

Other nations also expressed reluctance to enter into agreements with the United States because they lacked confidence in the American government's power to implement binding agreements, given the need for state implementation. …

Given this experience, the Framers viewed the inability of Congress to prevent the breach of treaties as one of the chief defects of the Articles of Confederation. Crandall 49, 51…

The Constitution addressed the federal government's impotence under the Articles of Confederation to ensure treaty compliance by assigning the treaty-making power exclusively to the federal government and by ensuring that the power was "disembarrassed *** of an exception [in the Articles of Confederation], under which treaties might be substantially frustrated by regulations of the States." *The Federalist No. 42*, at 211 (James Madison). At the same time, the Framers chose not to impose subject-matter limitations on the Treaty Power because "[t]he various contingencies which may form the object of treaties, are, in the nature of things,

incapable of definition." 3 *Elliot's Debates* 363 (Edmund Randolph); see *id*. at 504 (Edmund Randolph).

The Framers safeguarded the interests of the States by requiring that treaties be approved by two-thirds of the Senate, which they saw as the protector of State sovereignty given the States' equal representation and the fact that Senators were (at that time and until ratification of the 17th Amendment in 1913) chosen by state legislatures. …

* * * *

b. This Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920) (Holmes, J.), rearticulated this well-established understanding of the Treaty Power and demonstrates why Section 229 falls squarely within the federal government's authority to ensure compliance with its treaty obligations.

i. In the Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 (Migratory Bird Convention), the United States and Great Britain mutually agreed to protect certain species of birds that, in their annual migrations, crossed between the United States and Canada. The treaty further provided that each country would "propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution" of the treaty, art. VIII, which the United States accomplished through the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755. That statute prohibited the killing, capturing, or selling of any of the migratory birds included within the terms of the treaty except as permitted by certain regulations.

Missouri argued that "the statute [was] an unconstitutional interference with the rights reserved to the States by the Tenth Amendment" and sought to enjoin its enforcement. *Holland*, 252 U.S. at 430-431. The Court explained that "[t]o answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States," because the Constitution "delegated expressly" the treaty-making power to the national government and provided that such treaties were "the supreme law of the land." *Id*. at 432 (citing U.S. Const. Arts. II, § 2, and VI).

The Court accordingly rejected Missouri's argument that "a treaty cannot do" "what an act of Congress could not do unaided." *Holland*, 252 U.S. at 432. The Court explained that while "the great body of private relations usually fall within the control of the State," "a treaty may override its power" according to the express design of the Constitution. *Id*. at 434-435. The Migratory Bird Convention did not "contravene any prohibitory words to be found in the Constitution," and the implementing statute, which closely tracked the treaty, was "a necessary and proper means to execute the powers of the Government." Id. at 431-433.

The Court found compelling practical reasons for the Founders' conferral of a broad Treaty Power on the federal government because treaties often deal with matters of the "sharpest exigency for the national well being." *Holland*, 252 U.S. at 433. And observing that the Constitution expressly renders States "incompetent to act" on treaties, the Court further explained that it was "not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Ibid*. (citation omitted).

ii. *Holland* makes clear that Section 229 is a necessary and proper effectuation of U.S. treaty obligations. Petitioner contends that the Court in *Holland* affirmed the Migratory Bird Convention only after weighing for itself "the relative national and state interests" at stake. That is incorrect. The Court noted that "the great body of private relations usually fall within the

control of the State" and held as a categorical matter that "a treaty may override its power." 252 U.S. at 434 (citing eight decisions of this Court in support); see *id*. at 432 (supporting same rule based on text and structure of Constitution). The Court later observed that "a national interest of very nearly the first magnitude" was involved in the Migratory Bird Convention and that Missouri's interest was insubstantial, *id*. at 435, but it nowhere suggested that its holding depended on a balancing of these interests. And petitioner points to no decision of this Court invalidating an exercise of the Treaty Power through application of any such balancing test.

In all events, *Holland*'s discussion of the Migratory Bird Convention itself is not directly relevant to petitioner's claim because petitioner here concedes that the CWC is valid. Petitioner nonetheless appears to argue that *Holland*'s determination that the implementing legislation was constitutional is inapplicable here because in *Holland* there was a "tight nexus between the treaty and the legislation." But the same "tight nexus" is present here. Upholding the application of the Act to petitioner's conduct does not imply a general "police power" to legislate solely to "protect the public" or safeguard "public safety." *Kebodeaux v. United States*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) (citation omitted). Rather, the Act aims at distinctly international and national concerns embodied in a valid treaty: the attainment of a global scheme to protect against the malicious use of chemical weapons while preserving beneficial, socially desirable uses and commerce—aims vital to national security.

Even assuming the Necessary and Proper Clause applies identically to treaty-implementation legislation as to other legislation, this Court's recent decisions on the scope of Congress's necessary-and-proper power in the domestic context leave no doubt that Section 229 was constitutionally applied to petitioner. *E.g.*, *United States v. Comstock*, 130 S. Ct. 1949 (2010). Analysis under that precedent also refutes petitioner's suggestion that upholding her conviction would imply a limitless congressional power to legislate on all local matters, thereby displacing state authority. …

First, the Constitution "grants Congress broad authority to enact federal legislation," *Comstock*, 130 S. Ct. at 1956, and that principle applies no less here than elsewhere. Indeed, federal authority is at its apex on matters related to foreign affairs. *Curtiss-Wright*, 299 U.S. at 315-318. Second, Section 229 adds incrementally to pre-existing and extensive federal regulation of harmful chemicals, cf. *Comstock*, 130 S. Ct. at 1958-1961, and implements a treaty on weapons—a quintessentially international subject matter. Third, Congress's judgment to adopt penal legislation that mirrored the terms of the Convention and thus regulated comprehensively was plainly reasonable. Cf. *id*. at 1961-1962. Fourth, the statute does not displace the authority of the States. Cf. *id*. at 1962-1963. Pennsylvania remained free to prosecute petitioner, *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (dual sovereign doctrine), …. Fifth, "the links" between the Act and the Treaty Power "are not too attenuated." *Comstock*, 130 S. Ct. at 1963. Indeed, the prohibition at issue here "closely adheres to the language of the … Convention," which itself addresses a matter at the historical core of treaty-making. The statute's links to the treaty are tangible, direct, and strong. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). Accordingly, under Comstock's analysis, Section 229 is valid necessary-and-proper legislation, and upholding it does not remotely suggest that "any one government [has] complete jurisdiction over all the concerns of public life." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

iii. In the more than two centuries of American history, this Court has never invalidated Congress's implementation of a treaty on federalism grounds. In declining to do so, *Holland* articulated a settled understanding announced and applied by this Court in numerous cases before and after *Holland* itself. *Holland*, 252 U.S. at 434 (citing earlier cases); see *Lara*, 541

U.S. at 201 (citing *Holland*); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172,204 (1999) (citing *Holland*); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691-692 (1979) (citing *Holland*); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (citing *Holland*); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (citing *Holland*).

* * * *

3. There is no basis for overruling Holland

The Court should reject petitioner's invitation to overrule *Holland*. This Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States v. IBM Corp*., 517 U.S. 843, 856 (1996) (citation omitted). No such special justification is present here. And "[s]tare decisis has added force" when the Political Branches have "acted in reliance on a previous decision." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Since the founding, U.S. diplomats have negotiated with foreign powers armed with the assurance that the United States possesses the authority to ensure implementation of its treaty obligations, even in areas generally reserved to the States.

a. The rule articulated in *Holland* (and applied repeatedly by this Court both before and after) has not proven "unworkable in practice." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (citation omitted). To the contrary, the Nation's experience with treaty-making demonstrates that the Framers did not envision a judicially enforceable "too local" limit on congressional power to implement a treaty and were correct in their conclusion that requiring both Presidential approval and the concurrence of two-thirds of the Senate would provide robust protection for the interests of the States in the treaty-making process. And to enact implementing legislation, the House of Representatives must also agree to the new law, thus providing another layer of safeguards.

The Senate has frequently imposed conditions or reservations on treaties to reflect federalism concerns. *E.g.*, *United Nations Convention Against Corruption*, S. Exec. Rep. No. 18, 109th Cong., 2d Sess. 9 (2006) (resolution of advice and consent) ("The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism.")…

The Executive Branch also takes into account federalism concerns—as well as the practical necessity of securing the support of two-thirds of the Senate—in developing the United States' position in treaty negotiations. For example, U.S. treaty negotiators can steer negotiations away from provisions that would needlessly federalize an issue best left to individual States or persuade other nations to address federalism in the treaty itself. *E.g.*, *Council of Europe Convention on Cybercrime*, S. Treaty Doc. No. 11, 108th Cong., 1st Sess. XXI-XXII, 21-22 (2003) (providing federalism carve-out in Article 41).

b. It is petitioner's proffered alternative, not *Holland*, that is unworkable. Petitioner suggests that if the President and Senate want to achieve an important foreign policy or national security objective through a treaty that would require regulation of a matter otherwise within the States' jurisdiction, then the national government must look to "state law" to implement the U.S. obligation.

But it was the national government's crippling need to rely on the States to implement U.S. treaty obligations under the Articles of Confederation, and the resulting denigration of American authority and negotiating power on the world stage, that led to the framing of the

Constitution's treaty provisions in the first place. Those provisions cannot now sensibly be read to require the very same chaotic practice of mandatory State treaty-implementation they were intended to end. While the Federal Government may choose to rely on state law to put the United States in compliance with a treaty obligation, that does not mean the Court should invalidate the political branches' considered judgment that the best way to ensure United States compliance with the obligation at issue here was to pass a comprehensive federal law. The Constitution gives the federal government exclusive power to enter into and negotiate treaties, and the Framers concluded that the federal government must have the concomitant power to ensure compliance.

Petitioner's suggestion that the treaty implementation power of the United States be subject to a case-by-case negation whenever a judge determines that the conduct regulated is too "local" or not of sufficiently "international" interest would compound the unworkability of her proffered alternative to *Holland*. American treaty negotiators must have confidence that the federal government possesses the authority to ensure compliance with U.S. treaty obligations and also have a clear understanding of the scope of their authority. Subjecting treaty-implementing legislation to ad-hoc, after-the-fact review and nullification on localism grounds would undermine both imperatives. Likewise, negotiators from other countries must have confidence that U.S. negotiators can deliver on their promises before agreeing to make their own commitments. *The Federalist No. 64*, at 329 (John Jay) ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."). If U.S. treaty-implementation measures are judicially negated after-the-fact, the underlying international law treaty obligations would remain, and the United States could be subject to countermeasures, such as other states' retaliatory suspension of their treaty obligations to the United States. Restatement (Third) of the Foreign Relations of the United States § 905 & cmt. b, at 380, 381 (1987).

* * * *

…Through the Convention, the United States manifested its judgment that use and proliferation of chemical weapons represented a grave threat to the national security of the United States. By entering into the Convention, it secured other nations' categorical commitment against such use and proliferation—"under any circumstances" not expressly permitted by the Convention. In return for that benefit and to support that nonproliferation goal, the United States made reciprocal commitments, including the commitment to enact penal legislation forbidding individuals from using chemical weapons "under any circumstances" not expressly permitted by the Convention. That was a commitment that the President and two-thirds of the Senate believed necessary to make in order to secure the foreign-policy, national-security, and economic benefits that would flow from the Convention.

Congress therefore enacted legislation coextensive with the Nation's treaty obligations. The implementing legislation banned conduct like petitioner's while exempting use of toxic chemicals only for "peaceful purposes" and other purposes expressly exempted by the Convention itself. Congress did not add additional exemptions, such as one for "local" use of a chemical weapon. Indeed, the fashioning of legislative exceptions not found in the Convention itself could have encouraged other States Parties to adopt their own novel exceptions, thus undermining both the Convention and the national security interests of the United States. The Treaty Power should not be read to require that very same exemption in the guise of an "as-applied" adjudication. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)

(warning against "the danger of unwarranted judicial interference in the conduct of foreign policy"); *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (it would be "danger[ous]" to find a "prosecution barred based on *** foreign policy concerns" that the Court "ha[s] neither aptitude, facilities nor responsibility to evaluate") (internal quotation marks omitted). Here, the President, two-thirds of the Senate (and then majorities of both Houses in passing the Act) determined that the Nation's paramount chemical weapons nonproliferation goals would be furthered by agreeing to the Convention and that the comprehensive penal legislation it called for was an integral part of that global nonproliferation framework. The courts should not second-guess that considered judgment.

c. *Holland* has not been undermined by subsequent decisions. *Holland* itself recognized that implementing legislation cannot override the "prohibitory words" of the Constitution applicable to all exercises of federal power, 252 U.S. at 433, and *Covert*, 354 U.S. at 16-17 (plurality opinion), reaffirmed that rule. Accord, *e.g.*, *Geofroy*, 133 U.S. at 267. Indeed, the *Covert* plurality emphasized that "there is nothing in [*Holland*] which is contrary to the position" taken in *Covert*. 354 U.S. at 18 (plurality opinion). The plurality explained that *Holland* "was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government." *Ibid*. "To the extent that the United States can validly make treaties," the plurality continued, "the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Ibid*.

* * * *

The flat constitutional prohibition on state treaty-making plainly distinguishes exercises of the Treaty Power from exercises of other enumerated powers, which inherently "presuppose[] something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). Given that the Constitution "expressly forbid[s]" States from entering into treaties, the Court has recognized that "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). As Attorney General Cushing explained in 1857, "[t]hat is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency." 8 Op. Att'y Gen. at 415. Without the power to implement treaty obligations, "the United States is not completely sovereign." *Curtiss-Wright*, 299 U.S. at 318; see *Holland*, 252 U.S. at 433.

* * * *

2. Constitutionality of MARPOL Amendment Procedure

In 2013, the U.S. District Court for the District of Alaska issued its decision on the U.S. motion to dismiss a case brought by the state of Alaska and joined by the Resource Development Council ("RDC") challenging the procedure by which an emissions control area ("ECA") off the coast of Alaska was established pursuant to the International Convention for the Prevention of Pollution from Ships ("MARPOL"), including Annex VI, and domestic implementing legislation (the Act to Prevent Pollution from Ships, "APPS," 33 U.S.C. §§ 1901 to 1915). *Alaska v. Kerry*, 972 F.Supp.2d 1111 (D. Alaska, 2013). The court granted the motion to dismiss and denied Alaska's motion for an injunction. The

court first considered the applicability of the political question doctrine to the first cause of action in the complaint, which alleged violations of the APPS and the Administrative Procedure Act ("APA") in the establishment of the ECA. The court agreed with the United States that the first cause of action raises a nonjusticiable political question and is therefore not subject to judicial review. The court next considered the claims under the Treaty Clause of the U.S. Constitution and the separation of powers doctrine, specifically, claims that the executive branch did not have the domestic authority to implement the amendment to MARPOL establishing the Alaska ECA because the amendment did not receive the advice and consent of the Senate nor was it implemented by legislation. As a threshold matter, the court held that whether domestic implementation of the ECA through the APPS presents an unconstitutional delegation of authority was not a political question. The section of the opinion discussing the Treaty Clause is excerpted below (with most footnotes omitted).

* * * *

…The parties agree that MARPOL and Annex VI were enacted into domestic law by APPS. The State maintains that the subsequent North American ECA amendment at issue in this litigation never came validly into force in the United States, as the Senate did not approve it and Congress did not implement it. The Defendants disagree, maintaining that both the Senate and Congress authorized the Secretary of State to accept the ECA amendment ex ante, and that such approach is constitutionally permissible.

i. Political Question Doctrine.

* * * *

… [I]n *Hopson v. Kreps* the Ninth Circuit held "that the criteria enunciated [in *Baker*] generally do not apply to claims that the executive has exceeded specific limitations on delegated authority." Indeed, the language the Supreme Court used in *Baker* renders the inapplicability of the *Baker* factors to this issue even clearer. The Supreme Court explained that "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Given this clear directive, the Court agrees with RDC that "[b]ecause the Constitution sets forth the requirement of Senate consent in the Treaty Clause, determining whether the Treaty Clause requires Senate consent to the ECA amendment falls squarely within the Court's province." Thus, the Court has subject matter jurisdiction over this issue and may consider it under Rule 12(b)(6).

ii. Senate Approval.

The [Second Amended Complaint or] SAC asserts that the Secretary of State's acceptance of the ECA amendment "did not create domestic federal law under the Treaty Clause . . . because it was not made by the President with the advice and consent of the Senate. Similarly, RDC asserts that "the Treaty Clause necessarily applies with equal force to treaty amendments, preventing them from becoming U.S. law without Senate advice and consent."

Preliminarily, the parties dispute whether Congress intended renewed Senate advice and consent to be part of the acceptance process for MARPOL Annex amendments. The Defendants maintain that the Senate gave its advice and consent when it approved Annex VI with the understanding that future designations of ECAs would not be referred to the Senate for further action. RDC asserts that Congress intended the prospective approval of amendments to apply only to technical amendments to MARPOL. It cites to the legislative history of the bill that became APPS, H.R. 6665, to support this assertion. The bill was referred to the House Committee on Merchant Marine and Fisheries, which produced a report recommending its passage. In the report's section-by-section analysis, the committee commented on the section that later became 33 U.S.C. § 1909. The committee explained that "[t]his section requires the advice and consent of the Senate to any proposed amendments to the MARPOL Protocol Articles." However, it explained that amendments to MARPOL Annexes were subject to a different process involving the Secretary of State:

> This rapid amendment process provides for relatively rapid updating of technical provisions without requiring the traditional, but more cumbersome, treaty revision process that will still be required for the MARPOL Protocol Articles. This rapid amendment process is necessary to stay abreast of new technology, thereby ensuring effective control of pollution from ships operating in the marine environment.

The Federal Defendants assert that "RDC fails to acknowledge [a] threshold, dispositive textual issue," which is that a limitation to technical amendments does not appear in the statutory language of APPS. Rather, they contend, "the ECA amendment fits within the express terms of Section 1909(b)," and "the ECA designation was among the types of amendments expressly highlighted by the Senate in its consideration that certain MARPOL amendments would not be brought to the Senate for its advice and consent." They identify documents in the legislative history of the ratification of Annex VI that support their position, several of which are also cited by the Environmental Defendants. RDC asserts that the Federal Defendants "selectively quote" documents in the legislative history and maintains that a closer look indicates the Senate "understood the executive could implement only certain types of amendments" without additional approval.

The Court finds that overall, the parties' citations clearly indicate the Senate was aware that certain types of amendments would be approved without further Senate involvement. This Court need not determine exactly what references to "technical" amendments in the House committee report may have meant, as the plain language of the statute is unambiguous and therefore dispositive: 33 U.S.C. § 1909(a) specifically requires "the advice and consent of the Senate" for amendments to MARPOL proper. However, Section 1909(b) expressly exempts certain amendments—including "proposed amendment[s] to Annex I, II, V, or VI to the Convention"—from that requirement.

iii. Congressional Implementation of the ECA Amendment.

The SAC also asserts that "[t]he ECA amendment . . . never became domestic federal law because it was never implemented pursuant to legislation passed by both houses of Congress." RDC supports the State's arguments in its briefing. The Federal Defendants disagree, contending that the North American ECA "entered into force for the United States consistent with both the Senate's understanding in giving its advice and consent to Annex VI and with its implementation

through [the APPS] legislation passed by both houses of Congress." The Clean Air Defendants and the Environmental Defendants support the Federal Defendants' position.

The State relies on *Medellin v. Texas* to support its arguments. *Medellin* involved a judgment of the International Court of Justice ("ICJ"), *Avena*, which resolved a dispute between several Mexican nationals, including Medellin, and the United States. The ICJ found that the United States had violated an article of the Vienna Convention in its dealings with those individuals who had been convicted in state courts within the United States. The President issued a memorandum stating that the United States would meet its obligations under *Avena* by having state courts give effect to that decision. Medellin filed a habeas corpus petition in Texas state court seeking to enforce his rights under *Avena*. The state court dismissed the petition on the grounds that *Avena* and the President's memorandum were not directly enforceable federal domestic law that would preempt the state limitation on the filing of successive habeas petitions. The Supreme Court agreed with the state court. It explained that the relevant treaty sources indicated that ICJ judgments were binding only between nations who were parties in the suit. Because *Avena* had not been implemented in the United States through legislation, it was not binding on the state court. The Supreme Court also held that the President's memorandum did not make the *Avena* decision enforceable domestic law because the President was not authorized by the relevant treaty sources or congressional action to implement the judgment.

The Federal Defendants distinguish *Medellin* from the present action, pointing out that *Medellin* turned on whether the relevant treaties were self-executing, as it was undisputed that no implementing legislation existed. Here, by contrast, there is no dispute that MARPOL is non-self-executing and that there is a specific legislative act authorizing its implementation. APPS expressly implements amendments to Annex VI by making it "unlawful to act in violation of the MARPOL Protocol" and by defining "MARPOL Protocol" to include "any modification or amendments to the Convention, Protocols or Annexes which have entered into force for the United States."

The Federal Defendants assert that "[t]o the extent Alaska is arguing that implementing legislation can only render an international commitment enforceable if Congress passes such legislation following the negotiation and conclusion of the international commitment, that is equally wrong. Congressional ex ante authorization for international agreements extends to the earliest days of the nation." They cite examples of implementing legislation for other treaties that involved ex ante authorization for entering into and amending international agreements. The Federal Defendants also cite a history of the Secretary of State's acceptance of prior MARPOL Annex amendments under Section 1909(b) that predates the 2008 APPS amendment implementing Annex VI.189 The Federal Defendants assert that as Congress enacted APPS against this background of ex ante authorization, Congress should be presumed to have intended to preserve it.

The State acknowledges that "it appears that the Executive has accepted regulations and amendments to international agreements and treaties that purport to be domestically enforceable without further action by Congress or even an agency rulemaking." But the State maintains that this history does not establish this practice as lawful, since as the Supreme Court stated in Medellin, '[p]ast practice does not, by itself, create power.'" However, in making that statement in Medellin, the Supreme Court quoted *Dames & Moore v. Regan*.[193] The full sentence in *Dames* reads: "Past practice does not, by itself, create power, but 'long-continued practice, known to and

[193] *Medellin*, 552 U.S. at 496 (quoting *Dames*, 453 U.S. 654, 686 (1981)).

acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.'"[194] Given Congress's long history of enacting legislation that authorizes the executive branch to accept and render enforceable amendments to international agreements, and the fact that MARPOL Annex amendments have been previously enforced through the *ex ante* authority of 33 U.S.C. § 1909(b), the Court finds that Congress should be presumed to have intended that MARPOL Annex amendments, including the North American ECA, that have been accepted by the Secretary of State would constitute enforceable domestic law without further implementation by Congress.

The legislative history of APPS supports this interpretation. The State asserts that when the Senate approved Annex VI in 2006, senators stated that Annex VI "'will require implementing legislation,'" which the State argues indicates they "implicitly prohibited the executive branch from unilaterally making any of the treaty obligations in Annex VI—including any obligations flowing from amendments—domestic federal law."

But the Federal Defendants persuasively contend that the State's reliance on this 2006 report is misplaced because it "ignores the chronology of the ratification of Annex VI and amendments to APPS." First the Senate approved Annex VI, then Congress amended APPS to include Annex VI; thus, at the time of the report cited by the State, Annex VI did indeed still "require implementing legislation." The Court therefore does not read the Senate report cited by the State as indicating anything beyond a recognition that Annex VI was not self-executing.

Accordingly, the Court finds that when the Senate approved Annex VI, and when Congress passed the amended version of APPS implementing Annex VI, they intended that the Secretary of State's acceptance of an ECA amendment at a future date would be effective domestic law without further Senate approval and would be implemented through the existing version of APPS without further congressional action.

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3. *Lakes Pilots Association v. U.S. Coast Guard*

On September 30, 2013, the U.S. District Court for the Eastern District of Michigan issued an opinion and order in *Lakes Pilots Association, Inc. v. U.S. Coast Guard*, No. 2:11-cv-15462, denying the parties' cross-motions for summary judgment. As discussed in *Digest 2012* at 112-15, the United States filed its motion and brief in support in 2012, arguing that summary judgment was appropriate because the plaintiffs had no enforceable rights under the international agreement between the United States and Canada which formed a crucial part of their challenge. The court found that, even assuming that plaintiffs could rely on the international agreement to make the argument that the Coast Guard's determinations were contrary to law, the administrative record before the court lacked important factual information necessary

[194] *Dames*, 453 U.S. at 686 (quoting *United States v. Midwest Oil Co*., 236 U.S. 459, 474 (1915)). The *Dames* Court also quoted Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which states that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." *Dames*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. 579, 610-611 (1952)).

for the court to determine if the Coast Guard acted reasonably. Therefore, the court remanded to the Coast Guard for further consideration.

Cross References

Extradition treaty with Chile, **Chapter 3.A.1.**
MLAT with Jordan, **Chapter 3.A.2.**
Asset sharing agreement with Andorra, **Chapter 3.B.4.b.**
Asset sharing agreement with Panama, **Chapter 3.B.4.c.**
Pursuing U.S. ratification of the Disabilities Convention, **Chapter 6.B.5.**
ILC's work on subsequent agreements and subsequent practice in relation to interpretation of treaties, **Chapter 7.D.1.**
ILC's work on reservations to treaties, **Chapter 7.D.2.**
ILC's work on provisional application of treaties, **Chapter 7.D.3.**
Marrakesh Treaty to Facilitate Access for the Blind, **Chapter 11.E.1.**
United States joining Patent Law Treaty, **Chapter 11.E.3.**
United States-Kiribati maritime boundary treaty, **Chapter 12.A.2.a.**
Entry into force of Arctic SAR agreement, **Chapter 12.A.6.**
Minamata Convention on Mercury, **Chapter 13.A.2.**
Transmittal to the U.S. Senate for advice and consent of fisheries conventions and amendment, **Chapter 13.B.5.**
Convention on Supplementary Compensation for Nuclear Damage, **Chapter 19.B.5.**
MNEPR, **Chapter 19.B.6.c.**